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**IN THE
COURT OF APPEALS OF INDIANA**

JACK ANDREW WATTERSON,)	
)	
Appellant-Respondent,)	
)	
vs.)	No. 39A01-0609-CV-403
)	
KEVIN L. JEMERSON and MAMIE DARLENE)	
JEMERSON,)	
)	
Appellees-Petitioners.)	

APPEAL FROM THE JEFFERSON CIRCUIT COURT
The Honorable Ted R. Todd, Judge
Cause No. 39C01-0601-GU-03

April 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Jack Andrew Watterson (“Jack”) appeals the trial court’s appointment of Kevin L. Jemerson and Mamie Darlene Jemerson (“Darlene”) (collectively, “the Jemersons”) as permanent guardians of J.W. and B.W., minor children of his former marriage to Tammy Watterson (“Tammy”). We reverse.

Issue

The issue is whether the trial court abused its discretion in granting the Jemersons’ petition for permanent guardianship of J.W. and B.W.

Facts and Procedural History

Jack had a son, Ja.W., with his current wife, Babette, before he began dating Tammy in 1995. When they began dating, Jack was aware that Tammy was pregnant with J.W. by another man, who has never established paternity or paid child support. J.W. was born on December 25, 1995. Jack and Tammy were married on April 28, 1996. Tammy became pregnant with B.W. in 1999. When Tammy was seven months pregnant, Jack left her and had a daughter with Angela Martz. Tammy petitioned to dissolve the marriage in October 1999 and gave birth to B.W. on February 2, 2000. Jack and Tammy’s marriage was dissolved on October 28, 2002. The dissolution decree identified J.W. and B.W. as “children born o[f] the marriage[.]” Appellant’s App. at 8. Pursuant to the decree, Tammy was awarded custody of J.W. and B.W., and Jack was granted visitation pursuant to the parenting

time guidelines¹ and was ordered to pay support.² Both Jack and Tammy subsequently remarried. Tammy and her husband resided in Milton, Kentucky. Jack and Babette reside across the Ohio River in Madison, Indiana. The Jemersons reside in Jeffersonville, Indiana.

In the fall of 2005, Tammy was diagnosed with terminal cancer. On January 17, 2006, Tammy made a will in which she nominated Darlene, her sister, to be J.W. and B.W.’s guardian upon her death and expressed her “strongest desire that no other relative of [her] children, including their non-custodial parent and natural father, be appointed guardian of [her] said children.” Appellees’ App. at 2.³ Also on that date, the Jemersons filed a petition for guardianship and a motion to appoint a guardian ad litem (“GAL”) for the children. The trial court granted the Jemersons’ motion to appoint a GAL that same day. On March 22, 2006, the GAL filed a report recommending that the Jemersons be appointed as the children’s

¹ According to the guardian ad litem’s report, Jack “reportedly [did] not take the children for an extended time during summer vacation as he could if he wished.” Appellant’s App. at 21. At the guardianship hearing, Jack testified that he had not been aware that he could do so. Tr. at 18. The report also states that Jack acknowledged that he “[did] not see the children during the week as he could, but he indicated that he and Tammy had difficulty arranging this visitation.” Appellant’s App. at 21. The trial court did not cite visitation issues as a basis for establishing the guardianship.

² At the guardianship hearing, Jack acknowledged that he had fallen behind in his support obligation and that his wages had been garnished to ensure timely payment. Tr. at 16. There is no indication that Jack is currently in default, and the trial court did not cite his support arrearage as a basis for establishing the guardianship.

³ We note that “[t]he mother cannot, by testamentary provisions or otherwise, deprive the father of his right to the custody of their minor child after her death.” *Gilmore v. Kitson*, 165 Ind. 402, 406, 74 N.E. 1083, 1084 (1905).

guardians, with Jack to be granted “liberal visitation[.]” Appellant’s App. at 22. Tammy died three days later. On March 27, 2006, the GAL filed an addendum to her report.⁴

On April 6, 2006, the Jemersons filed an amended petition for guardianship. The trial court conducted a two-day hearing on the petition. On April 7, 2006, “in consideration for the children in regard to the elementary school situation[.]” the trial court granted temporary guardianship to the Jemersons, with Jack to receive weekend visitation, and took the matter of permanent guardianship under advisement. Tr. at 239. On June 2, 2006, the trial court entered an order awarding the Jemersons permanent guardianship, with Jack to have visitation every other weekend and as agreed upon by the parties. The trial court also ordered Jack to pay child support to the Jemersons.

On June 30, 2006, Jack filed a motion to correct error. On July 31, 2006, the trial court held a hearing on Jack’s motion. On August 21, 2006, the trial court entered an order “more completely articulating its reasons” for establishing the guardianship and denying Jack’s motion to correct error. Appellant’s App. at 55. This appeal ensued.

Discussion and Decision

Jack appeals the trial court’s appointment of the Jemersons as permanent guardians of J.W. and B.W. In reviewing the trial court’s orders, we employ a two-tiered standard of review. *In re Guardianship of L.L.*, 745 N.E.2d 222, 227 (Ind. Ct. App. 2001), *trans. denied*.

⁴ Tammy died on a Saturday when the children were visiting Jack. The addendum to the GAL’s report states that Jack did not let the children return to their stepfather’s house on Sunday evening. The GAL was “disturbed that Jack Watterson [was] making this extremely difficult time even more so for his children” and believed “that his actions and his disregard for his children, as well as for Tammy and her family, indicate that he [did] not have his children’s best interests in mind.” Appellee’s App. at 26. The record reflects that Jack pursued this course of action on the advice of counsel. Tr. at 205.

We first determine whether the evidence supports the findings, and then we consider whether the findings support the judgment. The trial court's findings and judgment will not be set aside unless they are clearly erroneous. A judgment is clearly erroneous when it is unsupported by the conclusions drawn, and conclusions are clearly erroneous when they are unsupported by findings of fact.

Id. (citations omitted). “We do not reweigh the evidence, but consider only the evidence favorable to the trial court’s judgment.” *In re Guardianship of B.H.*, 770 N.E.2d 283, 288 (Ind. 2002).

Additionally, we note that

[c]hild custody determinations fall squarely within the discretion of the trial court and will not be disturbed except for an abuse of discretion. Reversal is appropriate only if we find the trial court’s decision is against the logic and effect of the facts and circumstances before the Court or the reasonable inferences drawn therefrom.

Id. (citation omitted).

“In the context of divorce, the settled rule in Indiana is that when a divorce decree gives custody to one parent, and that parent subsequently dies, the right to custody immediately and automatically inures to the surviving parent.” *In re Guardianship of Phillips*, 178 Ind. App. 220, 224, 383 N.E.2d 1056, 1059 (1978); *see also* Ind. Code § 29-3-3-3 (providing that a surviving parent has, “without the appointment of a guardian, giving of

bond, or order or confirmation of court, the right to custody of the person of the minor”).⁵ In

B.H., our supreme court acknowledged

the important and strong presumption that the child’s best interests are ordinarily served by placement in the custody of the natural parent. This presumption does provide a measure of protection for the rights of the natural parent, but, more importantly, it embodies innumerable social, psychological, cultural, and biological considerations that significantly benefit the child and serve the child’s best interests.

770 N.E.2d at 287.

The Jemersons contend that the term “natural parent” necessarily implies a biological relationship and point out that Jack is not J.W.’s biological father. Appellees’ Br. at 13 (citing BLACK’S LAW DICTIONARY 232 (7th ed. 1999)).⁶ We note, however, that Jack dated Tammy during her pregnancy, married her when J.W. was four months old, and lived with him as a parent until he was five years old. J.W.’s biological father never established paternity or paid support, and his stepfather never adopted him. J.W. was decreed to be a child of Jack and Tammy’s marriage, and Jack was granted visitation and ordered to pay

⁵ This rule does have statutory exceptions, none of which apply here. Indiana Code Section 29-3-3-6(a) provides that “[t]he surviving parent of a minor child does not have the right to custody of the minor without a proceeding authorized by law if the parent was not granted custody of the minor in a dissolution of marriage decree and the conditions specified in this section exist.” Those conditions involve the appointment of a temporary guardian for the minor if

- (1) the surviving parent, at the time of the custodial parent’s death, had required supervision during parenting time privileges granted under a dissolution of marriage decree involving the minor; or
- (2) the surviving parent’s parenting time privileges with the minor had been suspended at the time of the death of the custodial parent[.]

Ind. Code § 29-3-3-6(b).

⁶ Black’s defines “natural child” as follows: “**1.** A child by birth, as distinguished from an adopted child. — Also termed *biological child*. **2.** An illegitimate child acknowledged by the father. **3.** An illegitimate child.” BLACK’S LAW DICTIONARY 232 (7th ed. 1999).

support. We further observe that Jack is the biological father of B.W., J.W.’s sister, and the Jemersons concede that “it is in the best interest of the children that they remain together.” Appellees’ Br. at 13. In sum, we can find no persuasive grounds for treating Jack as anything other than a natural parent to both children for purposes of this guardianship proceeding.

We return again to *B.H.*, in which our supreme court held that

before placing a child in the custody of a person other than the natural parent, a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement. The trial court must be convinced that placement with a person other than the natural parent represents a substantial and significant advantage to the child. The presumption [that the child’s best interests are ordinarily served by placement in the custody of the natural parent] will not be overcome merely because a third party could provide the better things in life for the child. In a proceeding to determine whether to place a child with a person other than the natural parent, evidence establishing the natural parent’s unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third person, would of course be important, but the trial court is not limited to these criteria. The issue is not merely the “fault” of the natural parent. Rather, it is whether the important and strong presumption that a child’s interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child’s best interests are substantially and significantly served by placement with another person. This determination falls within the sound discretion of our trial courts, and their judgments must be afforded deferential review. A generalized finding that a placement other than with the natural parent is in a child’s best interests, however, will not be adequate to support such determination, and detailed and specific findings are required.

.... [I]n reviewing a judgment requiring proof by clear and convincing evidence, an appellate court may not impose its own view as to whether the evidence is clear and convincing but must determine, by considering only the probative evidence and reasonable inferences supporting the judgment and without weighing evidence or assessing witness credibility, whether a reasonable trier of fact could conclude that the judgment was established by clear and convincing evidence.

770 N.E.2d at 287 (citations and some quotation marks omitted).

The June 2006 order on the Jemersons' guardianship petition reads in pertinent part as follows:

The Petitioners Kevin and Darlene Jemerson are husband and wife. Darlene is a sister to Tammy. Darlene and Tammy have always been close, and the Jemersons have always spent much time with the children. They became more involved in [J.W.] and [B.W.'s] lives after the terminal diagnosis of Tammy. Tammy's will made it clear that she wished the Jemersons to become guardians of the children.

While Jack has seen the children regularly every other weekend, he has not taken an active interest in their schooling or health care. [J.W.] has a heart condition that requires treatment and care on an ongoing basis. This is something Darlene is familiar with. Jack is not.

The children have expressed to the Court and to others their dislike of their eleven year old half-brother [Ja.W.], who lives with their father and his mother Babette. [Ja.W.] is routinely mean to both [J.W.] and [B.W.]. His presence is a definite and real concern to them both. This is unsettling to both children.

The Court finds by clear and convincing evidence that Kevin and Darlene Jemerson should be appointed as guardians of both children. They are in the best position to provide the children with the stability and continuity they need at this time in their lives.

Appellant's App. at 33-35.

This order lacks the detailed and specific findings required to support the removal of the children from their natural parent. The order informs us that Jack regularly visited the children every other weekend, but we are left to guess at the trial court's basis for finding that "he has not taken an active interest in their schooling or health care." It is hardly surprising that Jack, the noncustodial parent, would not be as familiar with J.W.'s medical treatment as Darlene, with whom J.W. spent considerable time during Tammy's illness. The only other relatively specific finding relates to J.W. and B.W.'s dislike of their older half-sibling, Ja.W., which is a common occurrence even in non-blended families.

The August 2006 order on Jack's motion to correct error reads in pertinent part as follows:

The Motion to Correct Errors and reply thereto both address this Court's Order Appointing Guardians dated June 2, 2006. That order was issued by the Court after a lengthy hearing in which the Court considered many factors in arriving at the decision. In listening to counsel, the Court realizes it could have better and more completely articulated its reasons for granting the guardianship. It will attempt to do so here.

Without repeating the facts contained in its Order Appointing Guardian[s] dated June 2, 2006, the Court incorporates same into this order by reference. The following findings are added to spell out in more detail the factual basis for the Court's decision:

1. Jack left Tammy in 1999 when Tammy was pregnant with [B.W.]. Thus, in addition to not being the biological father of [J.W.], he has never lived with [B.W.]. Tammy had full custody of both children until her death.

2. Jack's life has been one of unstable relationships involving having children by three different women. He had a child with his present wife before he married Tammy. When he left Tammy he began dating and had a child with Angela Martz. He then left Ms. Martz and moved in with [Babette] Cosby (mother of his first child [Ja.W.]). He later married her.

3. Further evidence of [Ja.W.'s] emotional instability include[s] an incident when he killed the family dog by drowning it in the bathtub and leaving the body on the bathroom floor.

4. The *guardian ad litem*, who is also a lawyer, strongly recommended the guardianship be established.

While mindful of the presumption in favor of natural parents, and the need for clear and convincing evidence to the contrary, the Court believes in this case there has been clear and convincing evidence presented which overcame the presumption in favor of the surviving parent. The Court is convinced that placement with the guardians represents a substantial and significant advantage to the two children. [J.W.] and [B.W.] will be together with people they know, and will be together in a stable environment. Their lives will be less upset than they would be if they are forced to be in an environment they do not find comfortable with people who do not understand their needs.

Id. at 54-56.

With respect to the first two findings, we note that Jack started dating Tammy when she was pregnant with another man's child and married her four months after J.W. was born.

In other words, both Tammy and Jack had “unstable” relationships prior to their most recent marriages. There is no indication, however, that Jack’s current marriage is unstable. We further note that Jack has exercised regular visitation with B.W. since at least 2002. As for Ja.W.’s drowning of the family dog, Babette testified that the dog had bitten him and that he was “defending himself.” Tr. at 174.⁷ She also testified that the incident had occurred more than four years before the April 2006 guardianship hearing and that she had taken him to a counselor, who “didn’t feel that he needed any” additional counseling. *Id.* at 175. There is no indication that Ja.W. has ever abused J.W. and B.W. or has engaged in similar behavior since that time. Finally, the order does not disclose the GAL’s specific grounds for recommending that the guardianship be established, let alone specifically determine that those grounds are sufficient to remove the children from Jack’s custody. *Cf. L.L.*, 745 N.E.2d at 232 (“[A] court should look beyond the evaluator’s ultimate custody recommendation and examine whether the evaluator’s report and/or accompanying testimony contains evidence of parental unfitness, abandonment, or other wrongdoing, or of compelling, real, and permanent interests of the child that require his or her custody with a third party.”).⁸

⁷ The GAL did not interview Ja.W. regarding the incident. Tr. at 161. There is no indication that J.W. and B.W. were present during this incident or that they are even aware of it.

⁸ The GAL’s report details many of Tammy’s concerns about Jack’s parenting ability; other than Jack’s being unaware of the children’s teacher’s names and the dates of their spring break (a common failing even among custodial fathers), the report largely fails to substantiate those concerns. Additionally, we find it troubling that the GAL was unaware that Jack is not J.W.’s biological father. *See* Tr. at 161 (“I didn’t know that until yesterday[.]”).

We appreciate the trial court's desire to maintain stability in the children's lives following the death of their mother, but, as Jack's counsel observed during the guardianship hearing, "no matter where they live, the children are going to have to go through transition[.]" Tr. at 165. It appears to us that Jack was never given the benefit of "the important and strong presumption that a child's best interests are best served by placement with the natural parent" because he had not been the children's custodial parent (and therefore had limited time and involvement with the children) and because he had not led as stable and as successful a lifestyle as the Jemersons, who had greater access to the children during Tammy's illness.⁹ We believe that a reasonable trier of fact could not have concluded that the trial court's judgment was established by clear and convincing evidence and that the trial court abused its discretion in granting the Jemersons' petition for guardianship.

Therefore, we reverse. We direct the trial court to dismiss the guardianship and to return the children to the custody of their father.

Reversed.

BAKER, C.J., and FRIEDLANDER, concur.

⁹ Jack points out that his parental rights have been curtailed to a greater extent than they would have been in a CHINS proceeding. *See* Appellant's Reply Br. at 8 ("Jack would have been better off for the Department of Family and Children to have filed a Child in Need of Services (CHINS) petition as the Department would have been statutorily compelled to take steps to reunify the family.").